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CONSIDERATION IN CONTRACTS

601 A. D. TO 1520 A. D.

The purpose of this article is to show the origin of the doctrine of consideration. Two agencies which may have had much to do with the shaping of the common-law doctrine of consideration will only incidentally be referred to. One is the jurisdiction of the chancellor over parol contracts before *assumpsit*. The other is the enforcement of parol contracts in the local courts. The first has already been ably treated.¹ The second should be worked out. It is felt, however, that research in that line is a large field in itself; and furthermore, that it is unnecessary for the purpose of proving the proposition to be submitted. It is believed that whatever influence the practice of the courts of chancery and the local courts may have had, and it is not suggested that it may not have been considerable, the doctrine of consideration would nevertheless have developed in the common law much as we find it to-day. In other words, the matter can be satisfactorily explained without going outside of the law of the king's law courts and the Anglo-Saxon law prior to the undertaking of contract jurisdiction by the king's courts.

Before an affirmative demonstration is taken up the ground must be cleared of an hypothesis, namely, that of Professor Ames, to the effect that consideration had its origin in the detriment suffered in deceit. The eminence of the author of the hypothesis and its very general acceptance make this task doubly necessary. It will be undertaken in Part I. In Part II, will be set forth a line of precedents going back to our earliest records of the Anglo-Saxons in England—this series of authorities being offered as the foundation of consideration.

I

Professor Ames has given us a history of the action of *assumpsit*.² It has been assumed that it accounts for the origin of the doctrine of consideration. In fact Professor Ames so intimates. Is there in truth a sufficient basis for such assumption?

The reasoning seems to be as follows: (1) It is shown that the action of trespass on the case in the form of deceit became

¹ Barbour, *History of Contract in Early English Equity*.

² (1888) 2 HARV. L. REV. 1.

the contract action of *assumpsit*; (2) the damage to the plaintiff in the action of deceit is assumed to be the foundation of the "detriment to the promisee" in the doctrine of consideration; (3) the identification must be correct, for no other explanation of the origin of the doctrine has been offered which accounts for the "detriment" aspect.

An attempt will be made here to show that there is no basis in logic or in the cases for such identification. It was necessary to allege in the declaration of *assumpsit* deceit and damages. It will perhaps not be contended that the allegation of deceit was taken seriously. For as soon as it had been held that deceit would lie, the word "deceit" was apparently never used again in the opinions of the judges. It is not mentioned in the excellent collection of cases to show the history of *assumpsit* in Williston, *Cases on Contracts*. No lawyer thought it worth while to argue that a breach of contract was a deceit for the very good reasons, we may take it, that he could not do so honestly and in addition was not required to do so by the courts. A showing of a breach of contract at once became sufficient to satisfy the allegation of deceit.

If the judges did not believe that a breach of contract was a deceit, and did not require proof of deceit, why should they have required the detriment suffered by reason of a deceit to be proved; and why in doing so should they require that the detriment must be suffered at the time the promise was made or the offer accepted? There is certainly no reason to believe that they acted so contrary to logic and common sense; that they took such an extraordinary leap; that instead of looking for the damages to satisfy the allegation of the declaration in the obvious place, the damages suffered by the breach, they went back to the time the contract was made.

It may, however, be suggested that the judges acted on the assumption that a deceit had actually taken place; that they either believed such to be the case, or at any rate treated the matter as if there had been a deceit. If so, the reasoning must have been as follows. A has parted with money or property in exchange for B's promise. He has done so in reliance on B's representations that the promise is a good one, one that will be carried out. The promise is not performed. Therefore, it was not a good one, but mere worthless words. Therefore, A has been deceived. The deceit took place at the time the promise was made; also the damages suffered in reliance must be sought at the time.

Of course, such is not the truth. If B had had the intention not to perform when he made the promise, and A had been misled, there clearly would have been a tort. Such was not the case; but conceivably the courts might have gone on the assumption that it was. The answer is that they did not, if we may judge from what the judges said in the reported cases. They were not so stupid as to be deceived themselves, nor did they pretend to be.

The leading case to show the transition, that is, the beginning of the application of case as a remedy for breach of contract, appears to be *Year Book*, 20 Hen. VI, chap. 34 pl. 4 in 1442 A. D. It is a leading case because it gives us the arguments which influenced the judges. The following translation is offered in the hope that it will make clear the attitude of mind of the judges:^{2a}

A bill of deceit against John Doig in the K. B. counted that he, plaintiff, had bargained with the said John on a certain day to buy from him so much land for 100£ and had paid him; that he would enfeof the said plaintiff within fourteen days after the year. The said John enfeofed another with the land, and thereby deceived the plaintiff. Defendant demurred, saying that plaintiff should have an action for breach of covenant and not this action. In the Exchequer Chamber, Ascoughe [J.]. If a carpenter undertakes to do work for me and does not do it, I shall not have an action of trespass, but only an action of covenant if I have a specialty; but if he builds the house poorly, then I shall have an action of trespass on the case, for the malfeasance is the cause of my action; and so in our case if the defendant had retained the land in his hand without making a feoffment, in that case the plaintiff would have only an action of covenant. And I consider it the same case when the defendant enfeofs a stranger, and when he retains the land in his hand, wherefore the action does not lie. Also this bill reads "He bargained ad amend," and by these words it is proved that he himself bought; wherefore there was no deceit when they did not agree on the bargain.

Paston [J.]. Yes sir, the bargain proves agreement, namely, when the money was paid.

^{2a} The author gratefully acknowledges the valuable assistance rendered by Dr. George E. Woodbine, of Yale University, in revising the translation of this case.

Babth. Take the case where the defendant after the bargain charges the same land, and then enfeoffs the plaintiff; now he would not have an action of deceit. (To which Ascoughe agreed.)

Babth. And according to my understanding, the law is the same where the defendant has charged the land, and where he enfeoffs another of all the land. Wherefore, etc.

Wanf. The defendant has done a thing badly for which the action of deceit will lie; for when he has enfeoffed a stranger, by that act he has disabled himself from making a feoffment to the plaintiff, even though he should purchase the land again and enfeoff him; for if he had a warranty for the first possession to heirs and assigns, in that case if he had enfeoffed the plaintiff according to the bargain he would be able to have voucher as assign, and now by the feoffment and the retaking before the feoffment to the plaintiff he is in another estate, and so the voucher as assign is lost, for upon that inability is this action founded. And so if I retain a person to purchase for me a manor for a certain sum, and then he buys the manor for himself, upon that I shall have an action for deceit. Thus it is in our case. Wherefore, etc.

Stokes had the same understanding of it. For suppose I retain one learned in the law to be my counsel with me at the Guildhall in London at such a day, at which day he does not come, wherefore my case is lost, now he is chargeable by me in an action of deceit; and yet he has done nothing, but because he did not do that which he undertook to do, by which I have been damaged, he will be charged in deceit.

Paston [J.]. Suppose that a man bargains to enfeoff me, as in our case, afterwards he enfeoffs another, and then re-enters and enfeoffs me, and the other ousts me; now action of covenant fails, for he has enfeoffed me according to his covenant, and yet the deceit remains upon which the action is founded; and that proves that it is not clear always that where there is covenant, there an action of deceit does not lie. Wherefore, etc.

Babth. Suppose that the defendant had enfeoffed a stranger, and had received back to himself the estate in tail, and then enfeoffed the plaintiff; is not that a great deceit (It surely is. [Q.d. quod sic]), and still that sounds in covenant. Wherefore, etc.

Ascoughe [J.]. If the feoffment was made by such a fraud, it is wrongfully done as in the case of misfeasance above, but in

our case no feoffment is made to the plaintiff either wrongfully or rightfully, and so there is no wrong except his breach of the covenant. Wherefore, etc.

Newton [J.]. The defendant has disabled himself from performing his covenant with the plaintiff, because he has enfeoffed another; and also the day has passed before which the feoffment should have been made; for what purpose should he have a writ of covenant when the defendant is not able to perform the covenant with him even though he has a specialty? (For no purpose, Q.d.) And then when the plaintiff has made a complete bargain with the defendant, now the defendant can demand his money in an action of debt, and in conscience and in right the plaintiff ought to have the land, even though the property cannot pass to him by law without livery of seisin. Then that would be marvellous law, that a bargain should be made by which one party would be bound by an action of debt, and that he should be without remedy against the other; for which reason the action of deceit well lies.

Fortescue [J.]. If I lease land by an indenture made for a term of years, and then I oust him within the term, and peradventure the tenant within twenty years after the end of the term brings an action of covenant against me, that well lies. Still he cannot recover the term, yet he may recover damages; and so in our case. And as to the fact that he has said that he has disabled himself, and upon this the action of deceit is based; I will put you a case in which the party has disabled himself, and yet no action will be there except covenant. As suppose I make a lease to Paston for a term of years, and I then lease the same land to Godred who occupies it; now I have disabled myself from making a lease to Paston, and yet he will have nothing except an action of covenant against me. Wherefore, etc.

Paston [J.]. Even if a man is able to have an action of covenant, yet that does not prove that he cannot bring an action of deceit; for all the covenants may be kept and still it is deceit. As suppose that a carpenter takes it upon himself to build me a house of a certain length, width and height, which he builds, but he makes a default in misjoining, or something of that sort, which is outside of the covenant; I cannot sue him in covenant because he has kept all of his covenants, but I have an action of trespass on the case for what he has done wrong. So here, even though I should have an action for breach of covenant,

yet because he has disabled himself, as above, I shall have an action of deceit. Wherefore, etc.

Newton [J.]. If I deliver a certain sum of money to Paston to deliver to Fortescue, if Paston does not deliver it, he is chargeable to me in an action of account, and also in an action of debt, and it is at my pleasure which I shall elect; but when I have obtained the result of one of the actions, the other is gone. So in our case there are the actions of covenant and deceit; and therefore the plaintiff may use deceit if he wishes. Wherefore, etc.

Fray [J.]. If in our case the defendant had ousted his feoffee and then had enfeoffed the plaintiff, then all of the covenants would be fulfilled: suppose afterwards the feoffee ousts the plaintiff, would he not have an action for that, because he could not have an action of covenant? I say that he would.

Ascoughe [J.]. No sir, he would have an action of deceit in your case; for it was his own folly to take an estate that was defeasible, where he could have refused the estate and held the defendant in an action of covenant, which lies up to the time the estate is taken.

Paston [J.]. It is not true that in every bargain there is a covenant, for if I buy a horse of you without warranty of soundness, there is no covenant there, and yet there is a bargain; and if he is sick in his body I would have an action of trespass on the case against you, and shall aver that you sold him to me knowing him to be sick. And there was a case in the Common Bench where the plaintiff bargained to have fourteen bags of grain of the defendant, the defendant knowing the said grain to be mixed with sand sold it to him, and the action was well maintainable. But see the record, for there there was a warranty that the said grain was merchantable, wherefore there is good reason why the plaintiff should have an action of deceit in such a bargain, even though he could bring covenant if he had a specialty.

Westbury [J.]. If one after such a bargain, as in our case, and before the feoffment, make a statute merchant, and then make the feoffment, the party would have an action of deceit; and so here.

Fortescue [J.]. If the case be law which Newton has put, then there is no question of the law in our case, for if each party shall be bound by action in one bargain, then it is meet that this action of deceit be maintained.

Paston [J.]. Let us then to this case.

Fortescue [J.]. Willingly. And sir, I wish to prove that if I buy a horse from you, the property of the horse is at once in me, and you would have an action of debt for the purchase price, and I would have an action of detinue for the horse on this bargain; but that is not so in our case, for although the plaintiff has a right to the land in conscience, yet the land does not pass without livery of seisin. Wherefore, etc.

Paston [J.]. In your case the contract is good without a specialty, and a good contract binds both parties; what reason is there then in allowing one party the action of debt, and not allowing the other an action? *Q.d. non est ratio*, when in right he should have the land. *Et adjournatur*.

The case was adjourned, but in a short time thereafter the action was allowed in a case with similar facts.³ In the latter case there was not a full discussion as in the case in 1442 A. D. quoted in full. We may take it, however, that the same considerations influenced the decision. In the earlier case all of the judges of the Exchequer Chamber except Ascoughe were clearly in favor of allowing the action, and it does not appear that he seriously opposed the policy involved. But several of them pointed out that there was no deceit in fact and that to permit the writ to lie would be allowing its use for breach of contract generally.

Some of the judges attempted a plausible argument which probably all present recognized to be unsound. They suggested that if the defendant after having conveyed to a stranger had then entered and enfeoffed the plaintiff he would have been guilty of deceit, assuming the plaintiff thought he was getting the title. It was recognized as unsound. As Ascoughe says:

“but in our case no feoffment was made to the plaintiff bad or good and therefore there is no wrong in this case except the breach of the covenant.”

The answer by the advocates of the innovation was that the result was just as unfortunate as if there had been a deceit. When the plaintiff has paid his money he ought in conscience and right to have the land, and not being able to get that should have damages. If there had been a sale of personalty which had been delivered the unpaid vendor could bring an action of debt and the purchaser, who had paid and had not received the

³ (1488) *Year Book* 3 Hen. VII, 14, pl. 20.

goods, an action of detinue in which damages might be recovered. So in a sale of land as the vendor may sue in debt, the vendee should have an action.

Let us then turn to the pleadings. If we take the original writ for trespass on the case in *assumpsit*,⁴ we see the allegation of a promise and the allegation of consideration therefor, and further on the words quoted by Professor Ames⁵:

“Yet the said C. D. not regarding his said promise and undertaking, but contriving and fraudulently intending, craftily and subtilly, to deceive and defraud, the said A. B. in this behalf, hath not yet paid the said sum of money, or any part thereof, to the said A. B. although oftentimes afterwards requested,” etc.

The declaration in *assumpsit* follows the same lines and uses the same words quoted.⁶

Such are the statements in the pleadings of a hundred years ago. They are without doubt the very same words as used when *assumpsit* was first brought.⁷ The declaration contained allegations of a promise, a consideration, and a breach, and these were the material allegations, the ones discussed in the cases. Whatever else was said was mere surplusage. Some of the words used in the writ of deceit may have remained. We find the above quoted words as late as 1824, and as Professor Ames says they point unmistakably to the origin of the action. But that does not mean that they were material. It is submitted that not a single contract case can be shown in which issue was taken on the allegation of fraudulent or deceitful intent.

There is nothing in the opinions of the courts, or in the pleadings, to indicate that the allegation of deceit was ever taken seriously. There is not a word in the cases to show that if it was taken seriously the deceit, or wrong, or the damage therefrom was conceived of as having taken place at the time the promise was made. There is not a word in the pleadings to suggest it. The above words alleging fraudulent intent follow the allegation of a breach and claim that the breach is the fraud. If there is any identification of the detriment from deceit, and detriment in contract cases, it is clearly the detriment suffered

⁴ See Stephen, *Pleading* (ed., 1824) p. 17.

⁵ (1888) 2 HARV. L. REV. 16.

⁶ Stephen, *Pleading* (ed., 1824) p. 47.

⁷ See Brown, *Placita Generalia* (pub., 1703) Vol. II, p. 35 ff.

at the time of the breach and because of the breach, and not the detriment suffered by the promisee at the time of the making of the contract. Such a theory advanced at this time must be considered a product of present-day imagination, and not a theory which in reality influenced the makers of the doctrine of consideration.

But it may be suggested that there was a time, before the separation between deceit *ex delicto* and *ex contractu* was sharp, when the two were confused in men's minds. Such, however, was not the case. For over a hundred years there had been allegations of assumpsit in trespass on the case, before that action was applied to cases which in reality were simple breaches of contract.⁸ They were actions against ferrymen, surgeons, farriers, barbers, and carpenters for badly performing work which they had undertaken to do. It was necessary to allege the assumpsit, for without it such injuries were not actionable. Consideration was never an essential allegation in the declaration. But the instant the action is brought for simple breach of contract "consideration" appears. Why the sudden change? Obviously the answer lies in the recognized difference in the two types of cases, one sounding in tort and one in contract.

In the early cases in which assumpsit was allowed the judges talk of "consideration,"⁹ "causa,"¹⁰ and "things done at defendant's request,"¹¹ but never once do they speak of deceit or damages caused thereby. Consideration was not required in the cases in which assumpsit had to be laid when the gist of the action was *ex delicto*, i. e., those assumpsit cases which preceded the application of the writ to breaches of contract. It has not since then been applied to true cases of deceit. But instantly we find the requirement in the first cases of contract.

There is an instantaneous transformation of the allegations of damages suffered by reason of deceit to allegations of a promise given in consideration of something, followed by a breach which is alleged to be a deceit; an immediate recognition that the cause of action has an entirely new basis. The words alleging deceit in the pleadings were retained as a pure fiction, and were recognized and treated as such. Judges looked to other sources for determining what promises were to be action-

⁸ See cases collected by Ames (1888) 2 HARV. L. REV. 2.

⁹ *Smith v. Smith's Case* (1584) 3 Leon. 88.

¹⁰ *Anon.* (1505) Keil. 77, pl. 25.

¹¹ *Hunt v. Bate* (1568) Dyer, 272.

able and what not, and promptly forgot the origin of the writ employed.

Nor can any aid for Professor Ames' theory be derived from the subsequent development of the law. We know that the tort action of deceit and the contract action of deceit travelled entirely different roads. A true deceit requires the misrepresentation of a fact, an intention that it be acted upon, an act in reliance upon the misrepresentation and a detriment suffered therefrom. In assumpsit it is entirely immaterial whether a person suffers damages in reliance on a promise. If the promise was without consideration there is no recovery no matter how great the detriment. If there is a technical consideration substantial damages may be obtained even though nothing is lost because of an act in reliance on the promise.

There is not an element in common between the two unless it be the detriment from deceit and the consideration required to make a promise binding. But they do not resemble each other except most superficially. Both are detriments. That is all. Suit is brought not to recover the detriment by way of consideration, but for the breach, and such has always been the case.¹²

Professor Ames would have us believe that a fiction became a reality, not that the allegation of deceit turned contracts into deceits perhaps, but that the other allegation of damages suffered in reliance, made consideration a *sine qua non*. The principal allegation, i. e., of deceit, was hardly taken seriously, but the subsidiary allegation of damages is supposed to have suddenly been transformed into something very different, a most serious requirement which had to be proved.

The proposition is most extraordinary and contrary to the history of fictions. Fictions have, to be sure, played a most important part in the development of remedies. By means of them old remedies have been applied to new cases, but perhaps in all other cases they have been recognized as fictions and by common consent treated as such. When the Roman provision of the Twelve Tables, the action *de arboribus succisis*, was applied to the cutting of vines, nobody was deceived nor did it give rise to a doctrine of substantive law. The same may be said of the common-law fiction by which land owners were allowed to make use of John Doe and Richard Roe in order that they might avail themselves of a writ designed for the protection of tenants.

¹² *Slade's Case* (1602) 4 Coke, 92 b.

And every other fiction that one can think of has played the same sort of part until finally abandoned even in form,¹³ unless the fiction in question is an exception.

It is felt that this is treating Professor Ames fairly though he does not give us the steps by which his deduction is reached. If all that he meant was that the courts enforced contracts to prevent the practice of deceit, it would amount to nothing more than saying that considerations of policy governed, for the practice could be prevented without making fiction reality; and consideration could never have had its origin in the fiction without such a process.

What actually took place is simple enough. The use of case for breach of contract was a clear case of policy, conservatively exercised.

The situation with which the courts were confronted presented an exact parallel to the cases where personal property was sold. In the latter case, if the goods were delivered, the vendor could bring debt. If they were paid for and not delivered the purchasers could bring detinue.¹⁴ Where land was bought and paid for as in the cases in which assumpsit was first brought (and it is most significant that it was first applied to cases of that type), the purchaser had no remedy corresponding to detinue. The unpaid vendor could recover in debt. The purchaser ought clearly to have had a reciprocal right.

The writs for recovery of land were proprietary or possessory. In detinue the plaintiff could get either the goods or damages. In the real property writs he could get neither in the principal case. Title had not passed to the plaintiff and the courts of common law could not give specific performance even where the vendor still retained the title. Nor could damages be recovered in the property writs as an alternative to conveying the property.

The cases were parallel. There was no reason why there should be a remedy in one case and not in the other. The courts of common law had to grant damages, or else see the cases pass to the chancellor, of whose jurisdiction they were

¹³ See Maine, *Ancient Law*, chap. on Fictions.

¹⁴ It is thought that, it is better to state the matter in the form of unilateral contracts or of bargains performed on one side; for the first indication of the enforcement in the royal courts of bargains executory on both sides seems to have been in the very year of the principal case, i. e., 1442. *Year Book*, 20 Hen. VI, 34, 4.

exceedingly jealous. Such was the real reason for the origin of assumpsit.

It would be a serious mistake to suppose that the judges who first allowed assumpsit had any intention of providing thereby a general remedy for breach of parol contracts. On the other hand they were clear-sighted enough to realize that they were opening the door. Like all good common-law judges they confined themselves to the case in hand and allowed the future to take care of itself.

It is perfectly obvious that in the absence of a specialty there was no writ in the register other than trespass on the case suitable to accomplish the object in view, to wit, to give damages to the plaintiff who had paid his money for land and had not got the land. It is equally obvious that the plaintiff should have his damages, as he could have if the subject matter of the contract was personal property. The courts gave him damages, allowing him to employ the fiction that he had been deceived as an excuse for bringing case. That is the whole story of the origin of assumpsit.

By way of summary then, it may be said that the employment of case in the form of deceit was simply and solely a matter of policy. The allegation in the original writ and in the declaration of assumpsit charging that the breach of the contract was done fraudulently was a pure fiction used only for the purpose of giving color. It was a mere sham, a pretense. The allegation never had to be proved and was never taken seriously. It was known to be a fiction and treated as such. There is not a word in the opinion of the judges to indicate that after it was once held that assumpsit would lie for breach of contract, they ever again thought of the origin of the action. There is not a single case in assumpsit in which the *ratio decidendi* (not what we should say was the *ratio decidendi*, but what the judges themselves gave as such) was that a breach of contract was a deceit. It is then far fetched to suppose that a matter which was not only not taken seriously, but not even thought of, could have been responsible for the doctrine of consideration.

II

The origin of the doctrine of consideration may be traced back to Anglo-Saxon contracts. Both Holmes in *The Common Law* and Pollock and Maitland in the *History of English Law* come close to such conclusion.

Holmes identified consideration with the *quid pro quo* of debt.¹⁵ Then taking the *quid pro quo* as meaning the conferring of a benefit on the debtor, he defined consideration as a benefit to the promisor. Such definition has not been considered satisfactory, for consideration is not always a benefit to the promisor. The generally accepted definition to-day is that consideration must consist of a detriment to the promisee, and that is certainly more accurate and comprehensive than Holmes' definition.

Was Holmes then entirely wrong in his demonstration? It is submitted that he was not; that consideration in both of its aspects of benefit to the promisor and detriment to the promisee may be traced to precedents in the action of debt, and then back to Anglo-Saxon law. The trouble was that Holmes rejected material which he need not have rejected and thereby arrived at a definition which was too narrow, thus discrediting his efforts. He makes much of the Anglo-Saxon formal contract which he calls the surety contract. Then he notes that from the time of Henry II to Edward III the surety could be held in debt on parol proof.¹⁶ After that he rejects the surety cases from consideration on the ground that after Edward III, sureties are held by writing only.¹⁷ In doing that he puts aside the cases which are responsible for the modern definition of consideration.

Pollock and Maitland had no theory of consideration to uphold, as the matter was one which did not fall within their period, but they had it in mind and dwelt at length on the analogy of the *quid pro quo* of debt, seeming thereby to agree with Holmes as far as he went. They also took note of the parol surety cases. They, however, did not reject them as having no bearing on the doctrine of consideration, but were content to call attention to them and to point out their origin in the Anglo-Saxon formal contract of the *wed*.¹⁸

For the origin of the formal contract of the Anglo-Saxons we must go back to the procedural contract. When in primitive times a member of one family had killed or injured a member of another, there was apt to be a feud. If the matter was settled, it was done by treaty, the terms of which were that the family of the wrongdoer was to pay a composition to the family

¹⁵ Holmes, *The Common Law*, p. 267.

¹⁶ *Ibid.*, p. 260.

¹⁷ *Ibid.*, p. 264.

¹⁸ Pollock and Maitland, *Hist. Eng. Law*, Vol. II, p. 209.

of the wronged.¹⁹ If there was a dispute as to whether the accused had in fact done the wrong the promise was conditioned on whether the accused could clear himself. He had to stand trial in that case either by oath or ordeal. If the parties to the treaty could not agree on the amount of composition payable by custom, the matter had to be referred to the decision of the *gemot*.

The ceremony by which the procedural treaty was entered into was as follows: The accused handed a *wed*—it was usually a stick, but might be almost any small article—to a representative of the plaintiff family, and the latter handed it to certain representative men of the defendant family.²⁰

The meaning of the ceremony was this. When a man is captured by his enemies he is of course disarmed. In the case in question, the family of the pursued has interfered to prevent capture. But the spear or weapon of the accused is nevertheless handed to the pursuers. The latter give it up to the defendant family in consideration of their promise to pay whatever composition turns out to be due by folk custom. Because of the promise the pursuit is given up and the peace preserved.

The effect of the pact is to put the pursued into the power of certain members of his own family. The men of the defendant family into whose power he is placed became his sureties. Their obligations were quite similar to those of bail to-day, in fact our bail is directly descended from the Anglo-Saxon procedural suretyship.

The formal contract of the Anglo-Saxons was merely an adaptation of the procedural contract to commercial purposes. In the case of assault, battery, or homicide, the contract was obtained by pressure and was the price of peace. In the case of theft, the owner laid claim to the article in question and the party in possession either had to give it up or give sureties to make his defense.²¹ In the case of contracts which were chiefly if not entirely confined to sales and loans, the sureties were provided at the time of entering into the contract. The *wed* ceremony was employed to make the contract binding. It was

¹⁹ For an interesting description of the negotiations leading up to the treaty, see *Laws of Edmund II*, 7.

²⁰ Wigmore (1896) 10 HARV. L. REV. 324, note.

²¹ Laughlin, *The Anglo-Saxon Procedure, Essays in Anglo-Saxon Law*, p. 202 ff.

then the business of the sureties to see that it was performed, and to produce the debtor to make defence if there was a dispute as to whether it had been performed or not. If the debtor did not perform it was the duty of the sureties to do so. In fact the contract had what to us may seem a peculiarity, in that the debtor was not bound. The sureties only were obligated to the creditor.²² The debtor's obligation was to the sureties only, by virtue of being in their power. That gave them control over his person and property, and enabled them to compel him to pay, or to apply the property themselves as far as it would go to the payment of the debt, and to obtain reimbursement in case they themselves had to pay in the first instance.

This formal, or surety contract, was used for all sorts of purposes. In fact it was the most general mode of contracting employed by the Anglo-Saxons.²³

But before the close of the Anglo-Saxon period a modification of the formal contract had come into use. By some it has been called "real," but that introduces Roman ideas and a wrong impression. It may better be called the "delivery-promise." When A sold and delivered goods to B and did not get the price, or loaned B money, the obligation of B to pay could be made actionable without there being sureties. What took place was this. The delivery of the goods or the money loaned was made formally and before witnesses. At the same time B promised to pay. The only difference between these transactions and similar ones entered into by the *wed* ceremony was the omission of part of the ceremony and the absence of sureties. The other essentials, formal delivery, formal promise, and witnesses, were present.²⁴ The reason, it is submitted, that the sureties could be omitted in the later Anglo-Saxon law is that the state had made provision for compelling every man to provide himself with sureties in advance, to hold him to answer any claim which might be made upon him.²⁵ The sureties not being present there would of course be no meaning in employing a *wed* which was for the express purpose of putting the debtor into the power of sureties.

²² Wigmore (1896) 10 HARV. L. REV. 328.

²³ Laughlin, *The Anglo-Saxon Legal Procedure, Essays in Anglo-Saxon Law*, p. 190.

²⁴ Schmidt, Anhang X, XI; see p. 679, *infra*.

²⁵ Ethelred I, 1.

Not that it is likely that the *wed* was quickly dispensed with. It had come to be looked upon as necessary to bind an agreement. The probabilities are that for a long time, after sureties had ceased to be a necessity, a *wed* was given to the party to be bound. Centuries later in the bilateral bargain, or "earnest" contract, the *wed* was still used to bind the bargain. So in addition to delivering the goods, the creditor perhaps handed the debtor a stick as a *wed*.²⁶ But after a time the futility of such a proceeding must have been seen, and the goods delivered then came to be looked upon as themselves constituting a sufficient *wed*.

That the term "delivery-promise" gives an accurate impression of the transaction may be seen from the analysis given. That such analysis is correct is shown by the procedure.

The plaintiff opened by the oath:

"Anhang X. In the name of the living God, as I money demand, so have I lack of that which N. promised me when I mine to him sold."

The defendant's plea was:

"Anhang XI. In the name of the living God, I owe not to N. 'sceatt' or shilling, or penny or penny's worth; but I have discharged to him all that I owed him, so far as our verbal contracts were at first."

The plaintiff's witness swore:

"Anhang VIII. In the name of Almighty God, as I here for N. in true witness stand, unbidden and unbrought, so I with my eyes saw, and with my ears heard, that which I with him say."²⁷

Note that what was said, the promise was quite as important as what was seen, the delivery.

There were then in Anglo-Saxon times two forms of contract in general use.²⁸ One of them was the surety contract. In that

²⁶ That was done when livery of seisin was made of land. Pollock and Maitland, *Hist. Eng. Law*, Vol. II, p. 83. And the probabilities are strong that the same was done in chattel transfers.

²⁷ Schmidt, *Anhang X, XI, VIII*.

²⁸ There were a number of others also, but for our purposes, they need not be considered.

the essence of the matter was that the promisee had suffered a detriment at the request of the promisor. In the sale or loan the promisee has parted with property to the debtor, if he may be so called when under no direct legal obligation to the creditor, at the request of the surety. In the older procedural contract the promisee has given up his right to take revenge on the pursued, at the request of the surety-promisors. In the newer or "delivery-promise," the promisor always received a benefit, the goods or money which were delivered to him at the time he made his promise.

It would, of course, be absurd to contend that the Anglo-Saxons looked for a detriment to the promisee, or a benefit to the promisor, as a test of the actionability of a contract. What counted with them was the form and the sanctions behind the form. In the earliest times when the state was weak, the essential thing was to have sureties to see to the performance of the contract. Later, when sureties were not necessary for each contract, because required by law to hold persons to every justice, the form still continued to be a *sine qua non*. The point is simply this, that the substance of the matter was precisely as indicated, i. e., the only promises which were actionable were in transactions in which the promisor had received a benefit, or in which the promisee had suffered a detriment, not that such phenomena alone made them actionable.

When we come to the age of Glanvil we find the same situation. He gives us two forms of the writ of debt. One ran against a surety, and the other against the debtor himself. The second is too familiar to require quoting. The first ran as follows:

"The King to the Sheriff, greeting. Command N. that justly and without delay he acquit R. of a hundred marks against N. for which he made himself surety to him, as he says, and whereof he complains that he has not acquitted him thereof, and unless he do so summon him by good summons, etc."²⁰

There can be no question that the surety's obligation was incurred by a surety contract of the Anglo-Saxon type. It possesses exactly the same characteristics. The surety's obligation is not collateral but primary. It is the surety and not the debtor who is liable. The debtor cannot be sued where there is a

²⁰ Glanvil, Book X, chap. 4.

surety.⁸⁰ That of course is precisely what we should expect. The king's courts, or Glanvil, did not invent contracts. They adopted the customary Anglo-Saxon law. Up to the time of Glanvil also there had been no opportunity to develop a common law of contracts. There were no cases of debt in the king's court before Henry II,⁸¹ and the contract cases in that reign were few and far between. They can be counted on one's fingers.

Every contract mentioned by Glanvil other than surety contracts were of the benefit to the debtor-defendant variety. They were confined to sales and loans in which there had been a delivery on one side.⁸² Also the same methods of proof were employed. Unless there was a charter the plaintiff had to make deraignment by transaction witnesses.⁸³ The witnesses testified to what they saw and heard, to the formal delivery, and to the promise made by the party upon receiving the property.⁸⁴

In the reign of Henry II, therefore, all actionable debts were confined to cases in which there had been a detriment to the promisee, i. e., in the surety cases, or a benefit to the debtor-defendant in the other cases.

Then coming to the reign of Edward I we may quote Pollock and Maitland. They tell us that the five common cases in which debt was brought were (1) for money lent, (2) for rent on leases, (3) for goods sold and delivered, (4) against sureties, and (5) for a fixed sum on a sealed document.⁸⁵ We see only one new class of cases since Glanvil, those in which debt was brought for the recovery of rent on leases. Leaving the written contract out of consideration, in three out of the other four classes the debtor-defendant had received a benefit. In the fourth the promisee had suffered a detriment at the request of the surety-promisor.

Such was the state of contract law at least up to the reign of

⁸⁰ Glanvil, Book X, chap. 3.

⁸¹ The few cases indexed under debt by Bigelow, *Placita Anglo-Normannica*, seem not to be debt cases.

⁸² Except the bilateral bargain which was still unfledged, or the unactionable *fides facta*. Glanvil, Book X, chap. 12 and chap. 14.

⁸³ Glanvil, Book X, chap. 12. Duel was also mentioned, but it is doubtful whether it was ever actually used in debt.

⁸⁴ Glanvil, Book X, chap. 18. Note that private contracts, those not made before witnesses, were not actionable.

⁸⁵ Pollock and Maitland, *Hist. Eng. Law*, Vol. II, p. 209.

Edward III. As late as 1314 A. D., we find a surety held by parol in an action of debt.³⁶

Let us summarize up to this point. We start with the procedural contract which goes back to the beginning of things legal. In the Anglo-Saxon records it is first referred to in the laws of Hlothaere and Eadric.³⁷ It must have been in use at least as far back as our earliest recorded laws, those of Aethelbirt, which date from 601-604 A. D. A non-procedural bargain is discussed in those laws, which must have been sanctioned by the *wed* ceremony.³⁸ And the *wed* contract is prescribed by the laws of Hlothaere and Eadric for binding a curator or depositee who was to keep the goods of a minor until he became of age.³⁹

The surety contract then, entered into by the *wed* ceremony, was in use throughout the Anglo-Saxon period from 601 A. D. on. It continued in common use through the ages of Henry II and Edward I, and at least up to 1314 A. D., i. e., to just before Edward III.

For seven hundred years then, prior to 1314 A. D., sureties were bound by their promises made by parol. The surety had received no benefit from the promisee, but the promisee had always suffered a detriment in reliance on the surety's promise, or at the request of the surety. In the procedural contract used in composition claims the pursuant had given up his right to take revenge in consideration of the promise of the sureties to pay whatever customary composition should appear to be due. In the surety contract used for commercial purposes the creditor had always given up property in exchange for the surety's promise to pay.

It is probably true that the *wed* ceremony continued to be used throughout the period. There are indications that the use of the ceremony to bind sureties and the holding of sureties alone on parol promises came to an end about the same time.⁴⁰ It was then the ceremony which in the popular mind had the binding effect. But the substance of the transaction was precisely as described. At a later time after the ceremony had become obsolete we ought not to be surprised to see the courts

³⁶ *Year Book*, 7 Edw. II, f. 242.

³⁷ Hloth. & Ead. 8-10.

³⁸ Aethelbirt, 77; cf. Edmund I, 1-7.

³⁹ Hloth. & Ead. 6.

⁴⁰ See p. 688, *infra*.

hold a surety on a parol promise without its having been accompanied by the delivery of a *wed*. The substance of the transaction being the same as those which for so many centuries had been taken cognizance of by courts, they could hardly be accused of a radical departure from precedent when in assumpsit they held the surety. Rather it was, it is submitted, a picking up of the thread of a very ancient line of precedents.

As to the "delivery-promise," on which the debtor himself, the party who had received the goods, was held, it is hard to say just when that developed, probably about 900 A. D. And it was, no doubt, sometime after that before it freed itself from the necessity of being accompanied by the *wed* ceremony. At any rate it was full grown in the time of Henry II, and Edward I. Up to 1314 A. D., it had perhaps 400 years of history behind it.

If we were to look at "delivery-promise" cases only and to generalize from them, we should be inclined to say that the substance of the transaction was that the promisor had received a benefit for his promise.

But if the *quid pro quo* doctrine had been formulated before 1314 A. D., to include all actionable parol contracts it would have had to be stated the other way around. We should have said that the promisee must have given something for the promise and we should have had the modern definition of consideration. That would seem a perfectly legitimate conception of the *quid pro quo*. But unfortunately such was not the case. That doctrine was formulated later, at a time when parol surety cases were not coming before the courts, and it must be admitted that the benefit aspect was more looked at than the detriment aspect. At a still later date, after assumpsit had come in, there can be no question that the courts conceived of the *quid pro quo* in debt as a benefit conferred on the debtor.⁴¹ For that reason no attempt will here be made to insist on defining the *quid pro quo* as a detriment suffered by the promisee. If that could have been done, a complete identification of consideration and *quid pro quo* would have been possible. We could have said Holmes was absolutely right in identifying the two. He was wrong only in his definition of the *quid pro quo*, and consequently also in his definition of consideration. But it is realized that

⁴¹ *Barter v. Read* (1585) 3 Dyer, 272 b; *Sidenham v. Worlington's Case* (1585) 2 Leon. 224.

the *quid pro quo* acquired such a meaning that a use of the term to describe a detriment to the promisee would hardly do.

However, we can say in conclusion that before 1314 A. D. in every actionable debt the debtor-defendant had received a benefit, or the promisee had suffered a detriment at the request of the surety-promisor, which is just about the definition of consideration commonly given by modern courts.⁴²

What happened after 1314 A. D.? Holmes makes the statement that by the reign of Edward III the parol surety contract ceased to be actionable; that a writing was thereafter required to charge the surety.⁴³ If all that he meant by the statements was that parol surety contracts were becoming obsolete, and that for two centuries, an example of a surety being sued alone and held on a parol promise was not to be found in the king's courts, no exception would here be taken to the remark. But there does not appear to have been a decision holding that a surety could no longer be held by parol in an action of debt. And the obsolescence of parol surety promises may be explained on other grounds than a determination on the part of the courts not to enforce them.

If the disappearance of suits against sureties on parol promises was the result of a conscious effort on the part of the courts, a determination to restrict the recovery on parol debts to those in which the defendant had received a benefit, it would be significant. If, on the other hand, it was due to entirely different causes, to a change in business usage, as, it is here submitted, it was, and not to a change of policy on the part of the courts, there was then no change in tradition.

First, what do the cases actually hold? The first cited by Holmes was in 1344 A. D.⁴⁴ In that case there was a *quaere* as to whether there should be a specialty to charge a surety. The other case on which he relies was in 1360 A. D.⁴⁵ In that case it was argued that the defendant surety could not be held because there was no specialty, but the case was decided on another ground. A third party had borrowed 100 shillings of the plaintiff. The defendant said that if the plaintiff would grant time until the following Michaelmas, that he, the defend-

⁴² Cf. *Currie v. Misa* (1875) L. R. 10 Ex. 153, 162.

⁴³ Holmes, *The Common Law*, pp. 261, 264.

⁴⁴ *Year Book*, 18 Edw. III, 13, pl. 7.

⁴⁵ *Year Book*, 44 Edw. III, 21, pl. 23.

ant, would pay. It was held that the defendant was not liable because by the defendant's undertaking the debtor was still bound as he formerly was. In other words the creditor had suffered no detriment, for he had given up no right against the original debtor. The inference therefore, it is submitted, to be drawn from the case is just the opposite from that which Holmes draws: to wit, that a surety could be held by parol, provided there was something given for his promise.

Holmes cites no cases which hold that a parol surety promise was not actionable, and it is believed that there are no such cases to be found between Edward III and the time assumpsit got under way.⁴⁶

What then do the cases show affirmatively in favor of the contrary proposition, i. e., that the parol surety could be held in debt after 1314 A. D.? There was another case decided about the same date as that last cited which recognizes that the surety could be held by parol,⁴⁷ but as it was asserted in the argument, in reply to the remark by defendant's counsel that the action was not maintainable without a specialty, that by the custom of London parol proof was good, the force of the case is weakened. And as Fitz-Herbert, in his *New Natura Brevium*, in making the statement that debt would lie by parol against a surety, relies on the above case, the matter is hardly proved. Yet it does mean much that a man of the legal attainments of Fitz-Herbert should be of the opinion in 1534 A. D. that debt did lie in such a case. His words were:

"And a man shall have an action of debt against him who becometh pledge for another upon his promise to pay the money, *without any writing made thereof*; quod vide in title de Pleg. acquietand, p. 43 Edw. III, 11."⁴⁸

As late as 1459 A. D.,⁴⁹ it was said:

"If I say to a surgeon, if he will go to one J. who is sick, and will give him medicine, and make him well, he shall have 100 shillings. Then if the said surgeon goes to J. and gives him medicine and cures him, he would have a good action of debt against me, although the thing was done for another and not for me."

⁴⁶ An extended search has failed to reveal such a case.

⁴⁷ *Year Book*, 43 Edw. III, f. 11.

⁴⁸ Fitz-Herbert, *New Natura Brevium*, 122 K. Italics are the author's.

⁴⁹ *Year Book*, 37 Hen. VI, 8, 18.

The dictum is clear that a parol surety promise was actionable, unless it be suggested that in the case described the defendant would become the principal debtor and not a surety. But any distinction based on the difference between a principal and a collateral debt was a thing of the future, and not applicable. It was entirely immaterial whether the person cured by the surgeon was also liable or not, for it has been seen that in the early law the rule was that the surety was liable, and the debtor was not.⁵⁰

To come back to the case in 1459 A. D.⁵¹ The facts of that case were as follows: Debt was brought on a parol agreement by which the plaintiff promised that he would marry the defendant's daughter, and the defendant was to pay the plaintiff 100 marks. The betrothal ceremony was celebrated, but the marriage did not take place. It was contended that the case was similar to that in which there had been a bargain for the sale of land. In that case it had been held that debt would lie, although livery of seisin had not taken place. In the principal case it was said the plaintiff was bound to carry out the marriage and that he had therefore suffered a detriment.⁵² But it was answered that that was a matter for the Courts Christian; that the lay courts could not compel marriage.

In another connection attention has been called to the case,⁵³ in which it was said a man who had promised to be a surety could not be held because the promisee had given up no right against the debtor.

There are then at least dicta between 1314 A. D. and 1520 A. D., to the effect that a surety might be held alone on a parol promise. And it is by no means certain that if a parol surety case had come before the courts they would not have held the surety. It seems most probable that they would have held him. The refusal by the courts to longer examine the *secta*, or suit,⁵⁴ would not mean that a case could not be proved against a surety by parol. It did mean that the *wed* ceremony to bind sureties had become obsolete, but sureties could no doubt be held as principal debtors under the "delivery-promise" contract.⁵⁵ In

⁵⁰ See pp. 677-678, *supra*.

⁵¹ *Year Book*, 37 Hen. VI, 8, p. 18.

⁵² Cf. Holmes, *The Common Law*, p. 269.

⁵³ *Year Book*, 44 Edw. III, 21, pl. 23; see p. 684, *supra*.

⁵⁴ See p. 688, *infra*.

⁵⁵ That was what was done in *Year Book*, 18 Edw. III, pl. 7, p. 22.

such a case, we may say, if we will, that the debtor is not a surety. But it should be kept in mind that the mere fact that no one else was bound to the creditor did not prevent the person who was bound from being a surety. In the early law the surety only was bound and the debtor was not.

It may well be that some of the cases which appear to be against debtors were in fact against sureties. There would be no difference between them as far as the creditor was concerned. If he was to hold one only it might be either the person to whom the money or goods was to be delivered, or the person at whose request they were to be delivered.

It is, however, natural to expect to see attempts soon made to hold both the debtor and the surety on "delivery-promises." That could be accomplished by means of the joint promise.⁵⁶ When we see joint debtors we know that generally as between themselves some are sureties. The one *quid pro quo* would in such cases serve to bind both debtor and surety.

The practice, if once established, of binding a surety alone by making the delivery of the goods to the surety would, by showing that the *wed* ceremony was not necessary, tend to make such ceremony obsolete. Even more so would a discovery that if the goods were delivered to both jointly and their joint promises taken, both surety and debtor could be held.

The chief factor in doing away with the *wed* to bind sureties was the increasing use of seals and writing. By the reign of Edward III the written contract had become common. If a transaction was of sufficient importance for a surety to be demanded the only prudent course for the creditor to take was to get the surety's promise under seal. The advantages of such a course were great. First, wager of law was a defense in debt when proof was by parol, while it was not to a sealed instrument. Second, a writing was easier to prove. The *wed* ceremony had to be proved by a transaction witness. Third, if the *wed* was used, only the surety could be held and not the debtor. And in the fourth place by the obligation under seal the parties could be held severally as well as jointly, which was perhaps not the case if the "delivery-promise" were used.⁵⁷

⁵⁶ *Year Book*, 6 Edw. IV, 24, nota 1. See also Sir Matthew Hale's note to Fitz-Herbert's, *New Natura Brevium*, 137 D.

⁵⁷ There is a case which seems to indicate that one of the parties could be held by parol, and the other on a specialty, *Year Book*, 28 Hen. VI, 4. In that case, which was in 1450 A. D., a prisoner in the Tower was sued

It is quite natural to see the practice continue of creditors trusting in parol promises of debtors in spite of such disadvantages, in small matters or in larger where complete trust was placed in the debtors. We, therefore, see cases in courts in which the trust failed and in which the defendant did wage his law. But when a creditor was sufficiently cautious to require a surety, he would naturally also take the precaution to get the surety's promise in writing and under seal.

We should then expect to see the *wed* ceremony, in its use to bind sureties, become obsolete, and that is evidently what took place. An indication that it did was the disappearance about the time of Edward III of the Anglo-Saxon transaction witness, shown by the courts ceasing to examine the *secta* or suit in contract cases.⁵⁸

The surety contract entered into by the *wed* ceremony, and binding the surety only, disappears; and we should not expect to see sureties as such sued alone by parol between 1314 A. D. and 1520 A. D. It is not at all strange then that a clear case holding the surety in such a way has not been found. But it seems that the change was due to no change in the law, but merely to such changes in business usage as have been indicated.

If then it is admitted that the surety contract between Edward III and Henry VI was on the one hand merged with the contract in writing and under seal, and on the other with the "delivery-promise," or "real" contract, was not Holmes' deduction after all correct?

Is not the mere absence of parol surety promises from the courts for about 200 years itself sufficient to break the continuity? Even if it does appear in 1520 A. D.,⁵⁹ that in an action of assumpsit a surety can be held on a parol promise, how can such a case be connected with cases between 601 A. D. and 1314 A. D., which held the surety on parol promises?

It is believed that the fact alone that the courts did take up the thread is sufficient of itself to show that the old precedents

in debt by parol for food and drink. It was held to be no defense to show that a stranger had made an obligation, i. e., a specialty, for the same claim. It had shortly before been held that an obligation if made by the debtor himself was a defense to debt on a parol contract; *Year Book*, 22 Hen. VI, 56.

⁵⁸ *Year Book*, 20 Edw. I, f. 307; *Year Book*, 17 Edw. III, f. 72; *Year Book* (7th ed.) II, 242.

⁵⁹ *Year Book*, 12 Hen. VIII, q. ii, pl. 3.

were not forgotten. That fact coupled with *dicta* during the intervening period showing that the courts continued to think of the detriment aspect of the matter,⁶⁰ makes a good case in itself.

But it is possible to go farther. The fact that a line of cases seems for a while to have merged itself in another, or in two others in this instance, does not necessarily show that it has lost its characteristics, especially when at a later time it emerges unchanged.

First, did the practice of using sealed instruments to bind sureties, instead of the *wed* ceremony, entirely change the nature of the transaction?

At a later date men came to look upon the sealed contract as a special kind of contract, but we cannot be too cautious about applying later conceptions to earlier facts. For centuries the writing, and then the writing under seal, was merely a method of proof. Pollock and Maitland say:

"We may doubt whether in the thirteenth century a purely gratuitous promise, though made in a sealed instrument, would have been enforced if its gratuitous character had stood openly revealed."⁶¹

The feeling and practice of requiring something in exchange for a thing or a promise goes back to the beginning of things legal, and was so deep rooted that it could not easily be shaken. It is true that if a man confessed a debt under seal he could not afterwards deny it. He could not contradict his confession by showing there was no *quid pro quo*. Thus a practical means was at hand for binding a man without a *quid pro quo*. But it may have been centuries, perhaps not until after the doctrine of consideration in *assumpsit* was coming to be formulated, before either theory or practice changed. As a matter of fact in almost every case in which a surety was held by specialty the promisee had parted with something at the request of the surety, and the specialty was merely regarded as a confession of the debt.

Why then should surety cases when proof was made by specialty be regarded in a light substantially different from those in which proof had been made by parol? Neither the transactions nor the tradition had changed.

⁶⁰ See cases pp. 685-687, *supra*.

⁶¹ *Hist. Eng. Law*, Vol. II, pp. 210, 211.

Again does the merging, for a while, of the surety and the "real" contract, by the binding of the surety jointly with the debtor, or singly as a "principal debtor," mean the loss of the tradition that, stripped of the *wed* ceremony, the substance of the matter between creditor and surety was that the former had suffered something or done something or given something at the request of the latter?

In this connection attention must be given to the theory that the action of debt was "proprietary" and that the contracts which it enforced were "real." It is believed that an over emphasis of this matter has done much to obscure the true nature of the contracts of the period.

In what sense was debt "proprietary"?

(a) Certainly not in the sense that a libel in admiralty is "real," or that the old writs for the recovery of land were proprietary. The thing claimed was not the defendant. The defendant in debt was always a person.

(b) Certainly not in the sense that the action of ejectment was "proprietary," for the title to a thing was never tried in debt, whereas it was incidentally in ejectment.

(c) Certainly not in the sense that actions for the protection of rights *in rem* might be called "proprietary," for debt could never be brought against a stranger for interference with the plaintiff's rights. It lay only against a person who had received property from the plaintiff by contract or who had made a promise to the plaintiff.

In fact debt in the *debet* was conceived of as more personal than our contract actions to-day. When it was brought against a personal representative it was not correct to use the word *debet*. That word was proper only where both parties to the transaction were alive. If either died there was no longer any "owing." The money was said to be unlawfully detained.⁶²

(d) Certainly not in the sense that replevin is proprietary, that the thing or money demanded could be specifically recovered. Even in detinue, which branched off from debt, the defendant always had his option of delivering the thing, or damages in its place.

On what basis then could debt be called "proprietary"? Apparently on the following grounds:

(a) The original writ of debt looked like the writ of right, which latter was admittedly proprietary;

⁶² Pollock and Maitland, *Hist. Eng. Law*, Vol. II, p. 205.

(b) It had some of the same characteristics, e. g., deraignment by battle, and defense by wager of law.

(c) The plaintiff in all the early cases in debt may plausibly be supposed by us to have thought he was demanding the return of his own,⁶⁸ though he ought to have known well enough that he could not get his own through the courts;

(d) In the early cases a *res* had been given by the plaintiff, and his right is therefore supposed to be based on a "real" contract.

Let us briefly analyze these propositions.

(a) First, what of the original writ of debt which Glanvil gives us? It looks as much like the writ of right as two peas in a pod. But these things should be noted. First, the other form of the writ of debt which Glanvil gives us should not be overlooked,⁶⁴ that is, the one directed against the surety-promisor. It does not resemble the writ of right in the least. Second, the most important word on which the theory of identity in the character of the two actions is based, i. e., "deforces," was almost immediately struck out, almost before it had been used in that form, and the word "detains" substituted.⁶⁵ Third, the writ of debt covered exactly the same field as was covered by the Anglo-Saxon contract procedure, which was clearly promissory and not "real."⁶⁶ May it not be that the original resemblance between the two writs was simply due to the tendency of a scribe to copy, and that the most incongruous part of the copying was soon struck out?

(b) As to the resemblances of proof in debt and the writ of right, the explanation is simple enough. They both originated about the same time, when the only methods of proof then in use were of course applied to them. Glanvil does give us battle as a method of proof in debt. But Pollock and Maitland tell us:

"The offer of battle in proof of debt vanishes so early that we are unable to give any one instance in which it was made."^{68a}

Battle was only appropriate for a "real" action, and may not

⁶⁸ Pollock and Maitland, *Hist. Eng. Law*, Vol. II, p. 208.

⁶⁴ Glanvil, Book X, chap. 7; given in full, pp. 678-679, *supra*.

⁶⁵ Pollock and Maitland, *Hist. Eng. Law*, Vol. II, p. 212.

⁶⁶ Laughlin, *The Anglo-Saxon Legal Procedure, Essays in Anglo-Saxon Law*, p. 197 ff.

^{68a} Pollock and Maitland, *Hist. Eng. Law*, Vol. II, p. 212.

the explanation of Glanvil's speaking of it be simply that he was suggesting a method of proof for new situations for which there were no precedents? He appears by no means sure of himself in some instances in which he mentioned trial by battle in connection with contracts.⁸⁷ The probabilities are that trial by battle was never used in an action of debt. As to wager of law, that was the customary defense to claims on promises and had been for many centuries.

(c) As to the supposed thought on the part of plaintiffs in suing in debt that they were only claiming their own, it may be said that, in spite of our assumed superiority of powers of analysis over our ancestors, it hardly seems probable. In an action on a *commodatum*, a loan for use, the lender naturally claims his own. But such suits must have been very rare indeed. They are rare with us to-day. In an action on a *mutuum*, a loan for consumption, such as a money loan, it is quite possible that plaintiffs conceived that they were demanding a return of their own, although if they had stopped to think about the matter, they were quite as capable as we are to-day of realizing that they were not going to get back the coins they loaned. But that is about as far as we can go. In the case of a sale, delivery was essential in the early law to pass title.⁸⁸ So even when the object bought was specific the purchaser who had paid in advance could not have conceived of it as his own, much less could the unpaid vendor suppose that the unpaid purchase price was already his. We are still before the age of consensual contracts, and also the passing of title by consent alone, without a delivery. Then, when we come to the surety's obligation, it would seem quite too much to suppose that the creditor thought he was demanding his own from the surety.

(d) As to the "real" character of the contract, such a term imported from the Roman law can do no good and much harm. It happened that the only contracts our Anglo-Saxon ancestors used were the sale and the loan, in both of which a thing was given by the creditor to the debtor. We may call the transaction "real" if we will, but we should remember that this only means that the delivery of a *res* was a characteristic part of the transaction. It does not mean that it was the delivery of the thing alone which created the duty to return or to pay. The

⁸⁷ See Glanvil, Book X, chap. 5.

⁸⁸ Pollock and Maitland, *Hist. Eng. Law*, Vol. II, p. 179.

promise was quite as essential. The transaction witnesses testified not only to what they saw, but also to what they heard.⁶⁹ And when we come to the surety contract, only by a great stretching can that be called "real." We would have to keep our eyes fixed on the creditor and say that it matters not whether he delivers the *res* to the promisor or to some third party.

Then we should remember that there was no break in contract law with the advent of debt in the king's courts, that precisely the same transactions were actionable in debt as by the customary law. We have the same "delivery-promises" in sales and loans, and we have the same parol surety promises, at least until 1314 A. D. So the use of the term "real" as applied to contracts of the day must be understood in a very special sense, meaning nothing more than that the plaintiff must have given something in return for the defendant's promise.

Then how can Pollock and Maitland's statement that debt was "proprietary"⁷⁰ be reconciled with their theory that the law did not recognize property in chattels? They say of an owner of a chattel:

"If he bails it to another, at all events if he bails it on terms that deprive him of the power to reclaim it at will, he abandons every sort, and kind of seisin." "We may call him owner or say that the thing belongs to him, but our old fashioned law treats him very much as if he had no 'real' right and no more than the benefit of a contract."⁷¹

There was no "real" action for the recovery of movables they say.⁷² But the action of debt which included detinue and which was at first the only action by which movables could be recovered was said to be proprietary. There was no property in chattels loaned or in chattels purchased but not delivered, but there was in money loaned, or in money demanded as the price of goods sold in an action of debt. Detinue which grew out of debt was "non-proprietary," but the parent action was "proprietary." That hardly seems reasonable.

The promise in all of the debt transactions was just as much a fact as the delivery. It was not a case of a delivery as such

⁶⁹ Laughlin, *The Anglo-Saxon Legal Procedure, Essays in Anglo-Saxon Law*, p. 187; Ethelred IV, 4.

⁷⁰ Pollock and Maitland, *Hist. Eng. Law*, Vol. II, p. 204.

⁷¹ *Ibid.*, p. 180.

⁷² *Ibid.*, p. 181.

raising a duty to redeliver or to pay. There was no obligation implied in law, nor was it implied in fact. The promise was express. The party who had performed did not sue for so much as his property was worth. If the transaction was a sale he sued for the express price which the purchaser agreed to pay. If the transaction was a loan, it was the promise to return an equal amount which created the debt. If money or property was delivered without such a promise, it was an executed gift. Not that the defendant had to use the express word "promise," but what counted was what was actually agreed upon at the time, the words that the witnesses heard; just as what they saw counted, i. e., the *quid pro quo* which the promisee delivered in their presence in exchange for the promise.

It is not at all to be wondered at that the brief original writ should mention only the debt, without stating either the delivery or the promise, nor that the declaration which amplified the plaintiff's claim should be content in describing the way the debt arose to say that it arose out of a certain described sale or a loan, without analyzing the elements of those well known transactions.⁷³

To say then that the writ of debt was "proprietary" and that the contracts which it enforced were "real" simply leads to confusion of thought. It would be quite as correct to say that both writ and contract were "promissory." But that also might be misleading. It is believed that a more accurate way of stating the matter is that the writ of debt was "personal" and the contracts which it enforced were formal. Then it may be explained that the formalities might be any one of three kinds: (a) a writing which after a time was required to be sealed; (b) a *wed* ceremony which bound the surety; and (c) a delivery by one party, and words of promise by the other made at the time of the delivery, the *res* being parted with in exchange for the promise.

It is submitted then, that the merging in the fourteenth century of the surety contract, on the one hand with the contract under seal and on the other with the "delivery-promise," did not break tradition. In the first case, the contract was in substance the same whether proved by writing or by parol. In the second case, there was also no change in substance, for the essence of both surety promise and "delivery promise" was that the promisee had given something for the promise.

⁷³ Cf. Fitz-Herbert, *New Natura Brevium*, p. 119.

In short, the philosophy and policy behind the doctrine of consideration goes back to the beginning of things legal without a break. On the one hand, in its simplest form it is a feeling that gratuitous promises ought not to be enforced. Pollock and Maitland say:

“We may take it as a general principle of ancient German law that the courts will not undertake to uphold gratuitous gifts or to enforce gratuitous promises.”⁷⁴

On the other hand, the courts will enforce promises in well known and customary transactions.

“They proceed outwards from a type such as the loan of money; they admit one *causa debendi*⁷⁵ after another, until at last they have to face the task of generalization. Still it is believed that all along there is a strong feeling that, whatever promises the law may enforce, purely gratuitous promises are not and ought not to be enforceable.”⁷⁶

When, then, an action of assumpsit was brought in 1520 A. D. against a surety where the promise was by parol, no struggle was necessary for the courts to hold the surety liable.⁷⁷ The surety always had been held from the beginning of legal time. For many centuries it had been by a special form of contract which was no longer used. But there is no reason to suppose that the tradition was forgotten that parol surety promises were binding. There were enough precedents recorded in the books to refresh the memory. True, for a long time the writ of debt seemed to have narrowed its scope. Sureties had been held either by specialty or as other debtors in the “delivery-promise,” and for some time no case against a surety alone by parol had been brought in the king’s courts. But what of that? The binding of sureties was a well known business transaction of great antiquity. It was entirely in accord with the principle of limitation that gratuitous promises should not be enforced. Even if it were true that through lack of use or by the going out of

⁷⁴ Pollock and Maitland, *Hist. Eng. Law*, Vol. II, p. 211.

⁷⁵ That phrase used by Glanvil is borrowed from the Roman law and tends to obscure the real nature of the contracts of the day. If it were translated as “customary business transaction” it could be squared with the facts.

⁷⁶ Pollock and Maitland, *Hist. Eng. Law*, Vol. II, p. 212.

⁷⁷ *Year Book*, 12 Hen. VIII, q. 11, pl. 3.

use of the *wed* ceremony the ability to hold sureties by parol in debt had been lost, that was no reason for refusing to allow the newly invented writ of *assumpsit* to lie in such a case.

The new writ had been applied to one case in which debt did not lie, that in which a man had purchased and paid for land and had not received his conveyance.⁷⁸ In such a situation damages were of course the only possible remedy for a court of law to give, and in order not to let the matter go without a remedy and pass entirely into the growing jurisdiction of the chancellor of which the courts of law were jealous, it was necessary to use the action on the case in the form of deceit to accomplish the desired result, for debt would not lie for unliquidated damages.

So when the case of a surety who had promised by parol came before a court of law, they allowed *assumpsit* to lie; for they had a feeling that if they did not, another matter would pass out of the jurisdiction of the law courts into that of equity.

The case which first held a surety in *assumpsit* is worth noticing.^{78a} Case was brought in the King's Bench against the executors of J. S. It was

"counted that one J. N. came to the house of the plaintiff to buy certain goods, and the said J. S., the testator, came with him, and when the said J. N. wished to buy, the plaintiff said he was in doubt about payment, and the said J. S., the testator, said to him, 'if he, J. N., does not pay you, I will pay you,' upon which promise the plaintiff delivered the goods to the said J. N. And the said J. N. was unable to pay the plaintiff, and later the said J. S. died, and the plaintiff says that he left sufficient assets to his executors to pay all his debts and legacies, and to satisfy him [plaintiff] also; and the question was whether he should have the action against the executors or not. And it was adjudged by all the justices that he should recover in the action for two reasons: for this, that he had no other remedy at common law except in this action; the other because the plaintiff, in reliance on the promise of the testator had delivered the goods, and there is no reason why his soul should be in jeopardy when he had sufficient to pay. . . . *Quaere*, if the testator were alive if he could have this action against him, or if he could wage his law in this case."⁷⁹

⁷⁸ *Year Book*, 20 Hen. VI, 34, pl. 4; pp. 666-670, *supra*.

^{78a} *Year Book* (1520) 12 Hen. VIII, q. ii, pl. 3.

⁷⁹ The above is in substance a translation of the case as reported.

The important step had already been taken in allowing case to be brought for breach of contract, although, as has already been pointed out,⁸⁰ the step was in some respects not a big one; for in the first case to which the writ was applied it amounted merely to giving a remedy on a contract in which the subject matter was land, where for a long time there had been a remedy in detinue where the subject matter was personal property.

The application of the new writ of assumpsit to the parol surety case seems to have been made without effort, though the circumstances of the case in which it took place are not without interest. The fact that the testator in all probability would have paid the debt, and that for the good of his soul it ought now to be paid, seems to have had some weight. But the simple truth is that the holding was not felt to be a substantial innovation, though the language of the case indicates at least a doubt whether there was any remedy at law unless case would lie.

Of the suretyship case, the translation of which is given above, Ames says:

"From that day to this a detriment has always been deemed a valid consideration."⁸¹

Such statement is accepted and with it the proof that the detriment aspect of consideration originated in the surety case. That seems perfectly clear when one notes that the other early cases which are decided on the basis that the plaintiff has done something at the request of the promisor are also surety cases.⁸²

If, then, in 1520 A. D. the generalization had been made which is known to-day as the doctrine of consideration, there would have been two types of cases to consider, (1) those in which the promisor had received a benefit, and (2) those in which a promisee had suffered a detriment at the request of a surety-promisor. There would seem to be no serious objection to stating the matter in the alternative as the courts commonly do, e. g.:

"A valuable consideration in the sense of the law may consist in some right, interest, profit, or benefit accruing

⁸⁰ See p. 674, *supra*.

⁸¹ (1888) 2 HARV. L. REV. 1.

⁸² E. g., *Hunt v. Bate* (1568) Dyer, 272, Williston, *Cases on Contracts*, p. 152; *Sidenham v. Worlington's Case* (1585) 2 Leon. 224, Williston, *op. cit.*, p. 153.

to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other."⁸³

But in the benefit cases, the matter might just as well be looked at the other way around, i. e., from the point of view of what the promisee has done. The now accepted definition of consideration as a detriment to the promisee, is simpler, and perhaps more scientific, for it announces the underlying principle which is at the foundation of consideration, to wit, that a promise will not be enforced unless the promisee has given something for it.

It is hoped that it has been shown that that principle goes back to the beginning of things legal and that the precedents based upon it are continuous from the earliest Anglo-Saxon times, through the ages of Henry II, Edward I, Edward III, and Henry VI until established anew in the reign of Henry VIII. If the line of precedents appears to have been interrupted between Edward III and Henry VIII by the absence for a time of cases holding sureties alone on parol promises, it was not a true break. The old tradition was never rejected and never forgotten. While during that period a generalization, which was made in the *quid pro quo* of debt, looked more to the benefit received by the promisor than to the detriment suffered by the promisee, the cases were, nevertheless, manifestations of the continuing principle that a promise would not be enforced unless the promisee had given something for it.

ROBERT L. HENRY.

FORMERLY PROFESSOR OF LAW,
LAW SCHOOL, UNIVERSITY OF IOWA.

⁸³ *Currie v. Misa* (1875) L. R. 10 Ex. 153, 162.